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US TAX COURT  
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JUL 5 2016

JEREMY M. JACOBS & MARGARET J. JACOBS  
Petitioner(s)

ELECTRONICALLY FILED

v.

Docket No. 19009-15

COMMISSIONER OF INTERNAL REVENUE,  
Respondent

## PRETRIAL MEMORANDUM

SERVED Jul 05 2016

**UNITED STATES TAX COURT**

JEREMY M. & MARGARET J. JACOBS,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 19009-15
	)	
COMMISSIONER OF INTERNAL	)	
REVENUE,	)	Filed Electronically
	)	
Respondent.	)	Judge Ruwe
	)	

**PRETRIAL MEMORANDUM FOR PETITIONERS**

Petitioners submit this memorandum in connection with the trial scheduled to be held before The Honorable Robert P. Ruwe during the special trial session of the Court commencing July 18, 2016, in Washington, D.C.

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## **II. AMOUNTS IN DISPUTE**

Respondent's Notice of Deficiency for Petitioners Jeremy M. Jacobs and Margaret J. Jacobs asserts that Petitioners are liable for income taxes for the following tax years and in the following amounts:

<u>Taxable Year Ended</u>	<u>Proposed Tax Deficiency</u>
December 31, 2009	\$45,205.00
December 31, 2010	\$39,823.00

## **III. STATUS OF CASE AND ESTIMATED TRIAL TIME**

Petitioners expect that the trial of their case in chief should take no more than one or two days. Trial is likely.

## **IV. MOTIONS AND EVIDENTIARY ISSUES**

Petitioners have not reserved any objections in the First Stipulation of Facts filed with the Court on July 5, 2016. No other motions are pending before the Court at this time.

## **V. STIPULATIONS OF FACT**

On July 5, 2016, Petitioners and Respondent submitted to the Court a comprehensive Stipulation with exhibits, consisting of 307 paragraphs and 590 referenced exhibits.

## **VI. WITNESSES**

Petitioners expect to call the following witnesses and anticipate their testimony to address the following issues:

1. Claude Julien - Head Coach of the Boston Bruins. Mr. Julien will testify to the Club's business activities when it is travelling to away games. More specifically, Mr. Julien will provide testimony regarding the Club's business activities performed at "away city" hotels (including the activities of players, coaches, trainers, and other staff who travel to away games), the manner in which the Club prepares for upcoming games, and his leadership of the Club in general.
2. Ryan Nadeau - Director of Hockey Operations/Analytics for the Boston Bruins. Mr. Nadeau will testify regarding the away city hotels where the Club stays when travelling to an away game. More specifically, Mr. Nadeau will provide testimony regarding the Club's requirements and expectations related to away city hotels, the

negotiation of various contracts related to the away city hotels, the logistical aspects of the Club's travel to away games, and the manner in which the Club accounts for and keeps records related to its travel expenses.

3. Don DelNegro - Head Athletic Trainer of the Boston Bruins.

Mr. DelNegro will testify to the business activities of coaches and staff who travel to away city hotels. More specifically, Mr. DelNegro will provide testimony related to the maintenance of player health when travelling to away games, training and conditioning activities performed at away city hotels, the nature and importance of meals consumed by players at the away city hotels, and the importance of rest as a component of maintaining player health and performance during an NHL season.

## **VII. ISSUES**

The fundamental issue in this case is whether Petitioners, sole owners of a National Hockey League ("NHL") club, the Boston Bruins (the "Bruins" or the "Club"), properly reported the deduction of certain expenses incurred by the Bruins pursuant to sections 162 and 274 of the Internal Revenue Code of 1986 as amended (the "Code"). These expenses were incurred in connection with meals

consumed by the Bruins' players and staff before NHL games played in cities other than Boston (i.e., away city meals).

There is no dispute that Petitioners properly deducted expenses incurred in connection with pre-game meals consumed in Boston. Nor is there a dispute that Petitioners were entitled to deduct at least half of the away city meal expenses. The sole issue for resolution is whether the away city meal expenses were subject to Code section 274(n)(1), which, unless an exception applies, limits the deduction of meal expenses to 50 percent of the amount otherwise allowable. Petitioners contend that not one, but two of these exceptions apply. First, expenses that are excludable from an employee's income due to the "de minimis fringe" exception found in Code section 132(e) are exempted from the 50 percent limitation. Code section 274(n)(2)(B). Second, expenses for entertainment that is sold to customers in a bona fide transaction are also exempted from the 50 percent limitation. Code sections 274(n)(2)(A), (e)(8). If the Court determines that either of these exceptions applies, Petitioners are entitled to fully deduct the away city meal expenses, as reported on Petitioners' federal income tax returns.

#### **VIII. SUMMARY OF FACTS TO BE PRESENTED AT TRIAL**

Petitioners' evidence at trial will establish that the Bruins conduct substantial business activity at hotels where the Club stays when travelling to an away game city. These activities include game preparation, player conditioning,



and broader strategic planning. The Bruins' business involves much more than the time that players spend on the ice during a game. Although physically and mentally grueling, that single hour of ice time is dwarfed by the time expended by players, coaches, trainers, managers, and logistics staff to prepare for each game. And, the evidence will show that while at the away city hotels, the Bruins make the pre-game meals available to all of their employees who travel to the away city. The Club's provision of these meals helps maximize the time that the Club has to prepare for a game, and the meal time provides an opportunity for players and coaches to meet to discuss game strategy. The meals are also designed to maintain and enhance the physical fitness and performance of the players.

The operation of a significant portion of the Bruins' business, and the provision of carefully tailored meals, while at away city hotels is consistent with two of the exceptions to the 50-percent limitation of Code section 274(n)(1): the exception for de minimis fringes and the exception for expenses for entertainment. Accordingly, Petitioners' deduction of the full cost of away city pre-game meals was proper, and should be allowed.

**A. The NHL and the Bruins**

The NHL includes 30 hockey clubs that were divided, during the years at issue, between two geographical conferences: the Eastern Conference and the Western Conference. These conferences were composed of three divisions each:

the Atlantic, Northeast, and Southeast divisions in the Eastern Conference, and the Pacific, Central, and Northwest divisions in the Western Conference.

The Bruins are one of the oldest and most prominent clubs in the NHL. In 1924, the Bruins were the first team in the United States to join the NHL, and since that time have won the Stanley Cup, the NHL's championship, six times. During the years at issue, the Bruins were assigned to the NHL's Northeast Division, in the Eastern Conference, where they were particularly successful. For example, during the 2010-2011 season, the Bruins won the Stanley Cup.

**B. The Bruins' Schedule and Travel Requirements**

NHL clubs are dispersed across the United States and Canada, requiring the clubs, including the Bruins, to travel to other cities for approximately half of their games. Playing in these away games — at least 41 each year — is an essential component of the Bruins' business. If the Bruins fail to play an away game, they forfeit the game, lose playoff race points, are subjected to financial penalties imposed by the NHL, and must indemnify the NHL club to which the game is forfeited for loss of revenue and other expenses.

Accordingly, flying to an away city immediately before a game is not an option, because there is too great a risk that in such circumstances the game will be missed and thus forfeited. Indeed, the NHL's rules, as well as the Collective Bargaining Agreement between the NHL and the NHL Players Association,

requires that the Bruins arrive in an away city well in advance of the game. This usually means arriving the night before a game.

As discussed below, away games are not only an essential component of the Bruins' business, they require significant preparation at the away city hotels involving the core members of the Bruins' hockey club.

**C. The Club's Business Activities Associated with Away Games**

**1. The Bruins' Travelling Hockey Employees**

The Bruins' business is composed of a variety of functions. These include the Club's hockey operations, scouting, and executive and business operations. The Club's travelling hockey employees, representing the core of its business, consist of between 20 and 24 hockey players plus the head coach, and varying numbers of additional personnel, including assistant coaches, medical personnel, trainers, equipment managers, travel logistics managers, public relations/media personnel, and other employees (the "Travelling Hockey Employees"). The Club's Travelling Hockey Employees travel to every away game.

**2. The Night Before the Away Game**

The night before an away game, the Club's Travelling Hockey Employees take a charter flight to the away city and check into a hotel there. As a general matter, the Club travels to an away city the night before an away game to ensure that the Club arrives at the away game in a timely manner, the players receive an

appropriate amount of rest and pre-game nutrition, and the Club has sufficient time to prepare for the game.

The purpose of the hotel stay is all business; the overnight stay is not some mere boondoggle for the players. If the Club arrives at an away city hotel early enough the day before it plays an away game, the Club conducts its business at the hotel that evening. For example, players receive physical therapy, massages, and other medical treatments. The Club's coaching staff meets to discuss game strategy, review video, and discuss player issues.

The night before the away game, players are subject to an 11:00 p.m. curfew. The Club may fine a player or scratch him from a game if he does not abide by this curfew. The Club's trainers remain "on-call" at the away city hotel all night, as they often are required to respond to sick or injured players.

### 3. Game Day Morning

Every morning before an away city evening game, the Club holds a pre-game breakfast, generally between 8:00 a.m. and 10:00 a.m. The Club holds the breakfast in the hotel banquet or meeting room assigned to the Club, as set forth in the contract entered into between the Club and the hotel.

The pre-game breakfast is made available to all Travelling Hockey Employees and is mandatory for all players. In this regard, one of the Club's Travelling Hockey Employees is responsible for ensuring that every player arrives

at and eats the breakfast, and players may be fined or scratched from games if they are absent or late. Although the meal is available to all Travelling Hockey Employees, certain non-player Travelling Hockey Employees may, on occasion, be unable to attend the breakfast if their job responsibilities require their presence elsewhere during the meals (e.g., a trainer may be attending to a sick or injured player, or an equipment manager may be at the rink setting up before a morning practice skate).

The Club uses the pre-game breakfasts to conduct its business. For example, the Club's head coach, with input from and participation by the assistant coaches, may hold a formal team meeting during the breakfast. This may include watching game film and discussing strategies for the upcoming game. Coaches may also speak to and review game film with players one-on-one or in small groups during the breakfasts. Finally, the Club's public relations staff may meet with players to discuss upcoming interviews, published stories, and other public-facing Club issues.

Following the pre-game breakfast, the Club either remains at the hotel or travels to the opposing NHL club's arena or practice facility. If the Club travels to the arena or practice facility, it does so immediately following the pre-game breakfast. While there, the Club practices for the upcoming game.

When the Club remains at the away city hotel, the Club continues to conduct its business at the hotel. For example, individual players receive medical treatments and massages from the trainers. Similarly, players who are injured are required to exercise in a manner directed by the Club's conditioning coaches. Other pre-game business activities continue as well, such as meetings between players and coaches, reviewing game film, line-up and roster adjustments, and so on.

#### 4. Game Day Afternoon

On days when the Club plays an away game in the evening, the Club holds a pre-game lunch, made available to all Travelling Hockey Employees, generally between 12:15 p.m. and 2:15 p.m. As with the breakfast, the Club holds the pre-game lunch in the banquet or meeting room assigned to the Club, as set forth in the contract between the Club and the hotel. At the lunches, coaches may conduct small group and one-on-one meetings, and the public relations staff may meet with players one-on-one to discuss anticipated media inquiries and interviews. And, just as with the breakfast, players can be fined or scratched from games if they miss the lunch.

Following lunch, the Club provides time for players to take a nap. In this regard, part of the players' responsibilities include obtaining sufficient rest before a game. Rest, including these afternoon naps, is important given the game, training,

conditioning, practice, and travel schedule required of the players. While the players rest, the remainder of the Travelling Hockey Employees continue to perform their responsibilities and prepare for the upcoming game.

On days when the Club plays an away game in the evening, the Club also makes available, generally between 3:15 p.m. and 5:15 p.m., a pre-game snack. This snack is made available to all Travelling Hockey Employees, and in the same location as the breakfast and lunch.

#### 5. Alternative Schedule in the Event of an Afternoon Game

Occasionally, the Club will play an away game in the afternoon, rather than in the evening. When the Club plays an away game in the afternoon, the Club holds a pre-game brunch meeting. This single meal and meeting replaces the breakfast and lunch meetings that are held before evening games. The Club generally holds the pre-game brunch for several hours between 7:00 a.m. and 12:30 p.m., depending on the time of the afternoon game. As with the breakfasts and lunches, the pre-game brunch is made available to all Travelling Hockey Employees, is mandatory for all players, and involves meetings, strategy discussions, film review, and other game preparation and media-related activities.

#### 6. Game and Post-Game Activities

Following the pre-game snack (or brunch in the case of an afternoon game) and two hours before the game, the Club travels to the away city arena. Upon

arrival at the away city arena, players stretch and get dressed in their uniforms. Each NHL hockey game includes 60 minutes of playing time and lasts approximately two and a half hours from start to finish. The Club generally stays at the arena for about an hour after the game. During this time the players shower, change their clothes, and meet with the media. When it leaves the away city arena, the Club boards a charter bus that takes the Travelling Hockey Employees directly to the away city airport, where they board a plane to travel to the next away city or back to Boston.

**D. Need To Conduct Business Activities at the Hotel**

The Club conducts its business activities at the away city hotel not out of mere convenience, but out of necessity. Many of the Club's decisions regarding strategy are not made until the night before, or the day of, the away game. These decisions cannot be communicated to the players until they are made. Similarly, the Club's players or the opposing NHL club's players may become injured, experience other health issues, or return from an injury within hours of the game itself, requiring last-minute adjustments to strategy. Additionally, film of games played the night before by both the Club and its upcoming opponent in the away city, and other information regarding those games, is not available until after those games are actually played. Accordingly, conducting many of its essential business activities days or weeks before an away city game simply is not an option.



Moreover, because the Club must travel to the away city hotel the day before the game, these activities must necessarily take place in the away city.

**E. Preparation To Travel to an Away City**

In order to ensure that its stay at the hotel allows the Travelling Hockey Employees to conduct the business activities described above, the Club demands that the hotels meet certain criteria and requests that they provide certain amenities and concessions. For example, the Club requires that the hotel provide three suites, in addition to the other sleeping rooms, at no additional charge. Two suites are assigned to the head coach and general manager, or assistant head coach if the general manager is not travelling with the team, so that meetings with coaches and players may be held in the suites. Another suite is assigned to the assistant trainer who is a massage therapist, so that massages and other sports treatments may be provided in the suite. The Club also requires that the hotel provide a meeting space for meals and group meetings so that the Club can dine, review film, and hold strategy discussions in private. Finally, the Club requires a late check-out time of 5:00 p.m. local time because the Club uses the hotel rooms and the banquet or meeting room assigned to it throughout the day on game day.

The Club usually stays at the same hotel each time it visits an away city, unless a better hotel becomes available. Reasons the Club may change hotels include the proximity to the away city arena, the level of service provided by the

hotel, the quality of the food served at the hotel, and the hotel's conduciveness to a good night's sleep for the players.

**F. Pre-Game Meals**

The pre-game breakfasts, lunches, snacks, and brunches described above (collectively, the "Pre-Game Meals") are provided in a banquet or meeting room at the away city hotel. The setup of the banquet or meeting room for the Pre-Game Meals includes round tables with chairs and buffet stations where food and beverages are served. There is no signage outside this room indicating that it is being used by the Club, so that the Club has privacy. This privacy is necessary so that the Club can discuss strategy for its upcoming game. It also ensures that the players are not distracted by fans or the media, and it protects their safety.

The Pre-Game Meals serve a number of purposes. The Club's Travelling Hockey Employees include professional athletes, coaches, trainers, and other staff. The players, in particular, have exacting nutritional needs to enable them to perform at their peak. The Club uses the Pre-Game Meals to control the type of nutrition that players receive on game days, to control the players' weight, and to ensure that players remain in top physical condition throughout the long NHL season. To accomplish this, the Pre-Game Meals provide the Club's Travelling Hockey Employees a nutritious and balanced selection of foods, including foods from all essential food groups, generous portions, and a wide variety of choices —

all carefully and specifically chosen by the Club. With little exception (e.g., regarding the type of cereal), all Pre-Game Meals are the same at every away city hotel, and all the food options available on the Pre-Game Meal buffets remain consistent from hotel to hotel. Seventy portions of protein are ordered for the pre-game lunch because, among other reasons, the players consume a disproportionate amount of food relative to non-athletes.

The Club also uses the Pre-Game Meals to manage player movement. For example, the mandatory pre-game breakfasts ensure that players are awake at an appropriate time, are alert, and are ready for the day ahead. In this manner, the Club uses the Pre-Game Meals to provide a consistent schedule and pre-game routine for the players.

## **IX. BRIEF SYNOPSIS OF LEGAL AUTHORITIES**

Code section 162 permits a deduction for all ordinary and necessary business expenses. Code section 274(a) disallows a deduction for certain meal and entertainment expenses otherwise deductible under Code section 162, unless the expenses are associated with the active conduct of the taxpayer's trade or business. For meal and entertainment expenses that are not disallowed by Code section 274(a), Code section 274(n) nonetheless limits the deduction to 50 percent of the amount otherwise allowable, unless one of several exceptions applies.

Of relevance here, Code section 274(n)(2)(B) exempts from the 50-percent haircut expenses that are excludable from an employee's income due to the "de minimis fringe" exception found in Code section 132(e). Additionally, Code section 274(n)(2)(A), which cross-references Code section 274(e)(8), exempts from the 50-percent limitation expenses for entertainment that is sold to customers in a bona fide transaction.

**A. The De Minimis Fringe Exception Applies.**

As noted above, Code section 274(n)(2)(B) exempts from the 50-percent limitation expenses for de minimis fringe benefits described in Code section 132(e). Code section 132(e)(2) defines the term "de minimis fringe" to include the operation by an employer of any eating facility for employees if (1) the facility is located on or near the business premises of the employer, and (2) revenue derived from the facility equals or exceeds the direct operating costs of the facility. Additionally, access to an employer-operated eating facility by a highly compensated individual is treated as a de minimis fringe with respect to that individual only if the facility does not discriminate in favor of highly compensated employees. The following discussion addresses these various requirements.

**1. The Away City Hotels Function as the Bruins' Business Premises.**

The hotels where the Club stays when it travels to away cities function as the Club's business premises. Although Petitioners are not aware of any authority

defining the term “business premises” for purposes of Code section 132(e), that term has been both administratively defined and subject to judicial interpretation for purposes of Code section 119. The term naturally should be understood to mean the same thing in both Code provisions. See *Western Nat’l Mut. Ins. Co. v. Comm’r*, 102 T.C. 338, 359 (1994) (“In employing the traditional tools of statutory construction, a court should assume that Congress uses language in a consistent manner, unless otherwise indicated.”), *aff’d* 65 F.3d 90 (8th Cir. 1995). The following analysis therefore focuses on the meaning of “business premises” under Code section 119 and applies that meaning equally under Code section 132(e).

Under Treasury Regulation section 1.119-1(c)(1), the term “business premises of the employer” means “the place of employment of the employee” — in other words, where the employee works. This broad regulatory language does not limit the place of employment to a single permanent office or fixed location, and the language comports with the legislative history of Code section 119. See H.R. Conf. Rep. No. 83-2543, at 27 (1954) (stating that “business premises” include leased lands (or national forests used under permit) used by a cowhand to herd his employer’s cattle). The courts have confirmed this interpretation. As the Tax Court has held, “the illustrations in the [congressional] conference report have been viewed as indicating that Code section 119 does not require that lodging [or meals] be furnished in the primary business structure of the employer in order to be

considered on the business premises.” *Benninghoff v. Comm’r*, 71 T.C. 216, 220 (1978), *aff’d* 614 F.2d 398 (5th Cir. 1980). The Court of Claims has echoed this sentiment, holding that “the statutory language ‘on the business premises of the employer’ infers a functional rather than a spatial unity.” *Adams v. U.S.*, 585 F.2d 1060, 1066 (Ct. Cl. 1978). The Service has adopted the same approach: “[O]wnership by the employer of the lodging or the place where the meals are furnished is not intended by Congress to be the crucial test, nor even an essential element of the meaning of ‘business premises.’ *Rather, the emphasis is upon the place where duties of the employee are to be performed.*” PLR 8405075 (Nov. 2, 1983) (emphasis added).

Since the focus is on the *function* of the location in question, the courts have, not surprisingly, relied on highly factual inquiries to decide what constitutes the business premises of an employer under Code section 119. The principal test in this area is whether the meals are furnished in a place where “the employee performs a significant portion of his duties or . . . where the employer conducts a significant portion of his business.” *Comm’r v. Anderson*, 371 F.2d 59, 67 (6th Cir. 1966). Indeed, some courts have even held that the taxpayer need only show that it conducts “some” of its business activities (rather than a significant portion) on the premises. *Benninghoff*, 71 T.C. at 220. In addition, the Service has stated in a General Counsel Memorandum that “the touchstone of the business premise

test is the [place's] relationship to the business activities of the employer.” GCM 39246 (Jan. 8, 1982) (quoting *Benninghoff*, 71 T.C. at 221). In other words, there must be an ““integral relationship”” between the property and the employer’s business activities. *Id.* (quoting *Benninghoff*, 71 T.C. at 221). In applying this inquiry, courts have emphasized the importance of understanding both the “employee’s duties as well as the nature of the employer’s business.” *Lindeman v. Comm’r*, 60 T.C. 609, 614–15 (1973), *acq.* 1973-2 C.B. 2.

The “nature” of the Bruins’ business involves being a world-class hockey team that plays half of its games away from home. The Club’s business — and the NHL in general — simply could not function if the Club did not travel to away cities for half its games. Moreover, part of being a world-class team entails spending a significant amount of time preparing for games, wherever that may be. The Bruins’ business activities do not consist simply of 60 minutes of ice time every couple nights. Far more time is spent preparing for a game than actually playing in it. Similarly, the players’ duties do not consist merely of playing hockey, but include discussing strategy with coaches and teammates, analyzing the opposing team, receiving medical treatment, and staying in top-notch physical and mental condition.

Because the nature of the Bruins’ business requires extensive pre-game preparation, the Bruins conduct significant business activities at the hotel. The

meetings allow coaches and players to review video, walk through plays, discuss strategy, and otherwise mentally prepare for game time. *See* PLR 8405075 (“[T]he emphasis is upon the place where duties of the employee are to be performed.”).

Furthermore, when it comes to these away games, there is an “integral relationship” between the hotel and the Bruins’ business activities. *See Benninghoff*, 71 T.C. at 221. The hotel space becomes part of the Bruins’ pre-game base of operations. It is used by the players, general manager, coaches, and staff to conduct the same pre-game preparation activities that the Club would conduct before a home game. In effect, all of the Bruins’ hockey operations — the core of the Club’s business — is transported from Boston to the away city the day before the game. Without a temporary base of operations in the hotel, the Bruins simply could not conduct their business activities in a satisfactory manner.

The fact that a hotel can serve as a taxpayer’s “business premises” is nothing new. The Tax Court has squarely addressed the issue. In *Mabley v. Commissioner*, T.C. Memo. 1965-323, 24 T.C.M. (CCH) 1794 (1965), the Tax Court held that hotel space used for mandatory lunches attended by a coal company’s senior executive staff qualified as the employer’s business premises for purposes of Code section 119. The meals lasted between one and three hours, and served



the purpose of providing the necessary daily contact among the president of the company and the members of his staff and for the purpose of thereby conserving normal working hours which would otherwise be consumed by many daily conferences among the various executives in the course of the business day.

*Id.* at 1796–97. The Bruins’ case is an even clearer example of when a hotel space becomes a taxpayer’s business premises. Whereas in *Mabley* only senior executive staff (consisting of the company’s president, vice presidents, and general counsel) participated in the luncheons, here, all Bruins employees who travel to an away city may attend the meals, with player attendance required. Moreover, unlike in *Mabley*, the Bruins use the hotel to conduct their business throughout the course of their stay there, not just during the several hours when meals are consumed. *See id.* at 1797 (“[T]he rented hotel suite in which the meals were furnished was acquired and actually used for the conduct of business of the company.”).

In short, the hotel serves as the Club’s business premises. *See Lindeman*, 60 T.C. at 614–15 (focusing on the “employee’s duties as well as the nature of the employer’s business”); *Anderson*, 371 F.2d at 67 (asking where “the employee performs a significant portion of his duties or . . . where the employer conducts a significant portion of his business”); GCM 39246 (stating that “the touchstone of the business premise test is the [place’s] relationship to the business activities of the employer” (quoting *Benninghoff*, 71 T.C. at 221)).

2. The Banquet or Conference Rooms at the Away City Hotels Are Eating Facilities Operated by the Bruins.

Consistent with the regulations under Code section 132, the Club contracts with away city hotels to lease and operate an eating facility. Under Treasury Regulation section 1.132-7(a)(2), an employer-operated eating facility for employees is any facility (1) that is owned or leased by the employer; (2) that is operated by the employer; (3) that is located on or near the business premises of the employer; and (4) wherein the meals are provided during, or immediately before or after, the employees' workday.

The Bruins enter into contracts with each hotel for the provision of sleeping rooms, a banquet or meeting room, and meals that are tailored to the nutritional needs of the players. The specifics of what the hotel will provide with respect to the meals and the banquet or meeting room where the meals will be served are memorialized on a meal-by-meal basis in Banquet Event Orders executed by the hotels and the Club. The Code and the Treasury Regulations do not define the term "eating facility," but according to the Service, the regulations "imply that an 'eating facility' means an identifiable location that is designated for the preparation and/or consumption of meals." CCA 201151020 (Dec. 23, 2011). Both the Club and the hotels contractually identify and designate the conference or banquet room as the place where the Pre-Game Meals will be consumed. The banquet or meeting

room where the Travelling Hockey Employees consume the Pre-Game Meals is therefore an eating facility leased by the Club.

It is also clear that the Club operates the eating facility as described in the regulations under Code section 132. Those regulations provide that “[i]f an employer contracts with another to operate an eating facility for its employees, the facility is considered to be operated by the employer.” Treas. Reg. § 1.132-7(a)(3). Here, the Banquet Event Orders set forth the agreement between the Club and the hotel as to the type and amount of food that the hotel will provide, the estimated meal attendance, the manner in which the banquet or conference room will be set up so that the Club may eat there, the staff the hotel will provide to serve the food, the manner in which the food will be served, etc. Simply put, the Bruins contract with the hotel to operate the eating facility at the hotel.

Finally, the away city hotels function as the business premises of the Bruins while the Club is travelling for its required away games, as discussed above, and the Pre-Game Meals are served immediately before or during the Travelling Hockey Employees’ work days. Accordingly, the hotel meal rooms constitute employer-operated eating facilities pursuant to Treasury Regulation section 1.132-7(a)(2).

3. The Revenue Derived from the Club's Eating Facilities at Hotels Equals or Exceeds the Direct Operating Costs of Those Facilities.

For an employer-operated eating facility to be treated as a de minimis fringe under Code section 132(e)(2), the revenue derived from the facility must equal or exceed the direct operating costs of such facility. The eating facility meets this requirement if the meals are subject to exclusion from the employees' income under Code section 119. *See* Code section 132(e)(2); *Boyd Gaming Corp v. Commissioner*, 106 T.C. 343, 350–53 (1996). Code section 119 permits an employee to exclude from income the value of an employer-provided meal if the meal is furnished (1) on the business premises of the employer and (2) for the convenience of the employer. As detailed above, the Bruins' Pre-Game Meals are furnished on the Bruins' business premises, at the hotels where the Club stays and conducts its business prior to an away game.

Code section 119(b)(4) provides that, as long as “more than half of the employees to whom such meals are furnished” are provided meals for the convenience of the employer, all of the meals are treated as having been furnished for the convenience of the employer. Whether meals are furnished for the convenience of the employer is a question of fact to be determined by an analysis of the surrounding facts and circumstances. Treas. Reg. § 1.119-1(a)(1). Generally, meals furnished by an employer without charging the employees are

regarded as furnished for the convenience of the employer if the meals are provided “for a substantial noncompensatory business reason of the employer.” Treas. Reg. § 1.119-1(a)(2)(i).

In *Mabley*, the Tax Court held that meals were provided for substantial noncompensatory business reasons when staff members were required to attend meals “for the purpose of providing the necessary daily contact among the president of the company and the members of his staff and for the purpose of thereby conserving normal working hours.” 24 T.C.M. at 1796; *see also Boyd Gaming Corp. v. Comm’r*, 177 F.3d 1096, 1101 (accepting the taxpayer’s stay-on-premises policy as sufficient to show that the meals were provided for the convenience of the employer and noting that “the Tax Court may not substitute a business judgment that is contrary to the unimpeached and uncontradicted evidence presented by the taxpayer”); Action on Decision 1999-010 (Aug. 30, 1999) (“More generally, in applying section 119 and Treas. Reg. § 1.119-1, the Service will not attempt to substitute its judgment for the business decisions of an employer as to what specific business policies and practices are best suited to addressing the employer’s business concerns.”).

Here, the Pre-Game Meals are provided for the convenience of the Club and for substantial noncompensatory business reasons. The meals are provided, in part, in an effort to fuel the players on game days so that players can maintain peak

performance, both during the upcoming game and over the course of the grueling NHL season. The meals allow the Club to control the players' nutrition in order to enhance their performance, which is why the meals must conform with strict nutritional guidelines. The players' participation in these meals is critical to the Club's ultimate purpose of playing, and winning, professional hockey games. And because this participation is critical, players can be fined or scratched if they miss meals or meetings.

Moreover, the meals help the Club maximize the time available to prepare for an upcoming game. In this regard, the Pre-Game Meals provide an opportunity for the Travelling Hockey Employees to meet with each other to formulate strategy for the upcoming game and to develop responses to media inquiries. Furthermore, the meal schedule controls the movement of the players throughout the course of the day and ensures that the players are awake, alert, and ready for the day ahead.

In sum, the Club has a policy of providing Pre-Game Meals before away games because, in the Club's business judgment, those Pre-Game Meals are an important component of the Club's success. It is the Service's policy not to question this judgment. *See* Action on Decision 1999-010.

4. The Bruins Do Not Provide the Pre-Game Meals in a Manner That Discriminates in Favor of Highly Compensated Employees.

The Bruins make the Pre-Game Meals available to every employee who travels with the Club to away games, regardless of the compensation level of those employees. In light of this, the Club's provision of the Pre-Game Meals does not discriminate in favor of highly compensated employees.

Code section 132(e)(2) provides that the provision of a meal to a highly compensated employee at an employer-operated eating facility will be treated as a de minimis fringe — and such amount will not be subject to the 50% limitation of Code section 274(n)(2)(B) — only “if access to the facility is available on substantially the same terms to each member of a group of employees which is defined under a reasonable classification set up by the employer which does not discriminate in favor of highly compensated employees.” Whether the eating facility is available on “substantially the same terms” and whether the classification system is a reasonable one that does not discriminate in favor of highly compensated employees are facts-and-circumstances determinations. Treas. Reg. §§ 1.132-8(c)(1); -8(d)(1). Moreover, even if access to an eating facility discriminates in favor of highly compensated employees, access to the eating facility by employees who are not highly compensated is treated as a de minimis fringe with respect to those specific employees. Code section 132(e)(2).

Here, although specifically designed with the players' nutritional needs in mind, the Clubs' Pre-Game Meals are available to all Travelling Hockey Employees. All employees who travel with the team are informed of the Pre-Game Meal times and are welcome to attend the buffet-style, drop-in meals. Because the meals are provided to all employees who travel with the Club, regardless of the employees' compensation, the Bruins' operation of an eating facility at the away city hotels does not discriminate in favor of highly compensated employees.

5. The Legislative History Supports Allowing the Full Deduction.

Allowing the Bruins to deduct 100% of the meal costs comports with the purpose of Code section 274(n), which is designed to prevent employers from “deducting too many personal living expenses as business expenses, thereby charging a large part of their cost to the Federal Government.” S. Rep. No. 99-113 at 67 (1986). The 50-percent limitation aims to address the fact that business-related meal expenditures still “convey substantial personal benefits to the recipients.” *Id.* at 68. At the same time, when these “personal benefits” are no longer substantial, such as in the case of de minimis fringe benefits, then a full deduction is allowed. In this regard, the Code section 119 exclusion — and the related full deduction allowed by Code section 274(n)(2)(B) — for meals eaten on the employer's business premises makes sense: If an employee has to eat at work



due to the special nature of his job, it's not likely that he's getting great personal satisfaction from the meal. The Tax Court has confirmed that Congress intended to allow the full deduction in these circumstances, when the meals were not "inherently personal." *See Boyd Gaming*, 106 T.C. at 353 ("In contrast with the abuses that the Congress meant to address in enacting Code section 274(n)(1), we see no abuse that would be curtailed by denying petitioners a full deduction for the cost of their employee meals. Indeed, petitioners' provision of employee meals is a far stride from the abuses that the Congress chose to address in their promulgation of Code section 274(n)(1).")

Here, the Pre-Game Meals are critical to the Bruins' business and result in only marginal personal benefits to the recipients. No doubt, many of the players would prefer to eat elsewhere if they could — at a different location, with a different menu, and with different people. However, their meals are carefully structured and selected for nutritional value and to enhance the players' physical preparation. For the coaches and other non-player employees who also take part in these meals, the meals are "merely incidental" to the overarching purpose of the related business meetings, *see Mabley*, 24 T.C.M. 1794, as they allow these individuals to be close to the players up until game time. Indeed, some coaches may not even eat the meals at all, as they may spend their "meal" time meeting with players and reviewing the prior game's film. The benefit to them of having a

meal served at the hotel is therefore marginal at best. In sum, these meals are a “far stride” from the abuses that Code section 274(n)(1) was designed to eliminate. See *Boyd Gaming*, 106 T.C. at 353.

**B. The Costs of the Meals Are Fully Deductible as Expenses for Entertainment Sold to the Public.**

The cost of the meals that the Bruins provide to their players is part of the expenses that they incur to provide top-flight hockey entertainment to their fans. Treasury Regulation section 1.274-2(f)(2)(ix), which expands on Code section 274(e)(8), provides an exception from the 50-percent limitation for “[a]ny expenditure by a taxpayer for entertainment . . . to the extent the entertainment is sold to customers in a bona fide transaction for an adequate and full consideration in money.” The regulation provides two examples of fully deductible costs: (1) a night club owner’s costs for “*producing* night club entertainment (such as salaries paid to employees of night clubs and amounts paid to performers)” and (2) a cruise-ship owner’s costs for “*operating* a pleasure cruise ship as a business.” *Id.* (emphases added). According to the legislative history, Congress passed Code section 274(e)(8) “to insure that a taxpayer who sells entertainment to others will be allowed to deduct expenses of producing that entertainment.” H.R. Rep. No. 1447, 87th Cong., 2d Sess. (1962).

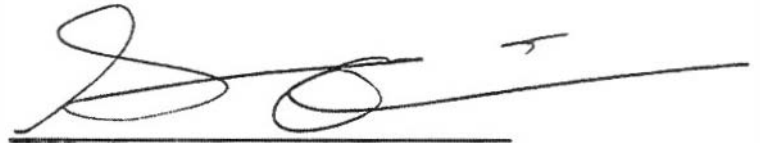
The players provide entertainment during a hockey game, and that entertainment is “sold . . . in a bona fide transaction” to the fans who watch the Club’s games. Part of providing this entertainment entails not only compensating or suiting up the players, but also preparing them, mentally and physically, both for the upcoming game and more generally for the duration of games over the course of the NHL season. The Club is therefore no different from a circus that must incur costs to train, feed, and care for its elephants prior to a performance. (The players might not be keen on this analogy, but it is apt nonetheless.) The circus’s food costs would be fully deductible. Similarly, the Club’s Pre-Game Meals are integral to “operating” a professional hockey team and “producing” an entertaining game for the fans. *See* Treas. Reg. § 1.274-2(f)(2)(ix). Without paying to put players on the ice, there is no on-ice entertainment product.

## **X. EVIDENTIARY PROBLEMS**

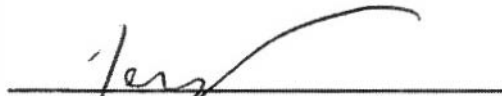
Petitioners are not aware of any evidentiary problems at this time.

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